Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

February 2005

Supreme Court will decide whether a non-profit corporation may receive an attorney fee award. In our September newsletter, we reported that *Frye v. Tenderloin Housing Clinic* (Cal. App. First Dist.; August 18, 2004) 120 Cal. App. 4th 1208, [___ Cal.Rptr.3d ___, 2004 Cal. App. LEXIS 1232], held that a nonprofit corporation that provided legal assistance to its low-income clients, may not recover attorney fees unless it is properly registered with the State Bar. The California Supreme Court has granted review (Case No. S127641). As a result, the case may no longer be cited.

Does the court or the arbitrator decide whether a dispute is arbitrable? Which came first, the chicken or the egg? Where a contract contains an arbitration clause but parties dispute whether the particular claim being asserted is subject to the clause, does the arbitrator decide the issue? In *Dream Theater, Inc. v. Dream Theater* (Cal.App. Second Dist., Div. 4; November 30, 2004) 124 Cal.App.4th 547, 21 Cal.Rptr.3d 322, [2004 DJDAR 14254], as modified December 28, 2004.

Dream involved a business sales agreement with a clause providing for arbitration of indemnity claims. The trial court had agreed with the seller that a suit for breach of contract was not subject to the arbitration clause. The buyer appealed, arguing that the decision concerning jurisdiction should have been made by the arbitrator. The Court of Appeal agreed with the buyer. Whether the issue is for the court or for the arbitrator depends upon the language of the arbitration clause. Here the clause incorporated the AAA Commercial Arbitration Rules; these rules provide that the arbitrator has the power to determine his or her own jurisdiction. Thus, the trial court exceeded its jurisdiction by deciding an issue that should have been decided by the arbitrator.

Lawyer's disqualification based on work done for defendant more than a decade earlier. In a case filed last September, but ordered published by the Supreme Court on December 1, the Court of Appeal reversed an order denying disqualification of a lawyer to act as expert witness on claims handling where the lawyer had worked for the insurance company defendant more than 10 years earlier. The decision was largely based on the fact that the lawyer had previously advised the defendant on claims handling practices. *See, Brand v. 21st Century Insurance Company* (Cal.App. Second Dist., Div. 2; September 1, 2004) 124 Cal.App.4th 594, [21 Cal.Rptr. 3rd 380, 2004 Cal. App. LEXIS 2026, 2004 DJDAR 14315] (WL 2729713).

The court noted, citing *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155, [624 P.2d 1206, 172 Cal. Rptr. 478] that "an attorney is forbidden [from using] against his [or her] former client knowledge or information acquired by virtue of the previous relationship." There is no time limit on this prohibition.

Senator Dunn to chair State Senate Judiciary Committee. The State Bar's Office of Governmental Affairs reported that State Senator Joe Dunn will chair the Senate Judiciary Committee. Senator Dunn, a trial lawyer from Orange County, has shown himself to be a friend of the judiciary and sensitive to the interests of lawyers.

Supreme Court will decide whether statute subjecting employer to liability for harassment by a third party will be applied retroactively. In September, we reported that our appellate courts were split on the retroactive application of *Gov. Code*, § 12940 (j) (1) that provides an employer may be liable for sexual harassment by a non-employee. The Supreme Court has now granted review in *Carter v. California Department of Veterans Affairs*, (Cal.App. Fourth Dist., Div. 2; August 17 2004) 121 Cal.App.4th 840, [17 Cal.Rptr.3d 674], the case that held retroactive application would violate due process. (Case No. S127921). As a result, the case may no longer be cited.

Where suit is the "catalyst" to change defendant's behavior, lawyer may be entitled to fees from defendant, even if case is moot by defendant's compliance. In *Graham v. Daimler-Chrysler Corp.*, our Supreme Court, in a 4-3 decision, held that lawyers who sued Chrysler for misrepresentations in advertisements, were entitled to a fee, even though, after the suit was filed, Chrysler offered to replace all vehicles that failed to meet the advertised capacities. *Graham v. Daimler-Chrysler Corp.* (Cal.Supr.Ct.; December 2, 2004) 34 Cal.4th 553, [21 Cal.Rptr.3d 31, 2004 DJDAR 14329, 2004 Cal. LEXIS 11334]; *see also, Tipton-Whittingham v. City of Los Angeles* (Cal.Supr.Ct.; December 2, 2004) 34 Cal.App.4th 604, [21 Cal.Rptr.3rd 371, 2004 DJDAR 14346, 2004 Cal. LEXIS 11335]. Prior History: 316 F.3d 1058.

Right to jury trial in actions for fraudulent conveyance based on historical analysis. The trial court erred when it characterized

Litigation Section Events

Annual Trial Symposium

April 15–17, 2005
Silverado Country Club and Resort
Napa Valley, CA

Details Available on Website Soon

a cause of action for fraudulent conveyance as "equitable" and thus, denied plaintiff's demand for a trial by jury. In *Wisden v. Superior Court* (Cal. App. Second Dist. Div. 8; December 3, 2004) 124 Cal.App.4th 750, [2004 DJDAR 14397], the court determined that, at least as far back as 1791, a right to jury trial existed in such actions. Under the provisions of California Constitution, article I, section 6, if a right to jury trial existed when California's Constitution was adopted in 1850, it exists now. If any member of the Litigation Section worked on the 1791 case, be sure to let us know.

If you want the opposing party's computer data, be prepared to pay for it. Under *California Code of Civil Procedure* § 2031 (g) (1), the demanding party must pay the reasonable expenses incurred in translating computer data into a usable form to permit the other side to respond to a demand for production. This can be expensive! In *Toshiba America Electronic Components, Inc. v. Superior Court* (Cal. App. Sixth Dist.; December 3, 2004) 124 Cal.App.4th 762, [2004 DJDAR 14401], the cost was estimated as between $1.5 and $1.9 million.

No duty to supplement answers to interrogatories with later discovered evidence. *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, [105 Cal.Rptr. 276] held that where a party willfully failed to disclose the existence of a witness in answers to interrogatories, the trial court properly precluded that witness from testifying at the time of trial. (This resulted in a nonsuit.) But the Court of Appeal has now ruled that this only applies where the failure to disclose was willful and that plaintiff did not have a duty to supplement his interrogatory responses after the witness was discovered, even though the response to the interrogatory had stated that plaintiff reserved the right to serve supplemental responses. The opinion also implies that, if there is time to cure the defect before trial, a party should be given an opportunity to do so. The court, therefore, reversed a summary judgment that was based on the exclusion of a declaration by a witness who had not been disclosed in answers to interrogatories. *Biles v. Exxon Mobil Corp.* (Cal. App. First Dist., Div. 2; December 14, 2004) 124 Cal.App.4th 1315, [2004 DJDAR 14850].

Caveat: The *Biles* court did not overrule *Thoren*. Therefore, if you intend to call a witness at trial who has not been disclosed, consider whether you should voluntarily serve a supplement response or, at least, advise opposing counsel by letter of the existence of the witness and your intention to call him or her.

Caveat2: Because of the holding in *Biles*, it behooves counsel to serve follow-up interrogatories as close to trial as permitted.

Lawyer's letter to client's auditor may retain work-product protection. A lawyer by sending a letter to the client's auditor concerning matters pertaining to pending litigation does not waive the work-product privilege. (*Laguna Beach County Water District v. Superior Court* (Cal. App. Fourth Dist., Div. 3; December 15, 2004) 124 Cal.App.4th 1453, [2004 DJDAR 14932].

Third party liability of engineers raises difficult issues. For a detailed discussion of the factors to be considered by the courts in determining whether an engineer may be liable to third parties for negligently performed design work that results in injury to a third party, *see, Weseloh Family v. K.L. Wessel Construction Co., Inc.*, (Cal. App. Fourth Dist., Div. 3; December 21, 2004) (Case No. G032874) [2004 DJDAR 15150, 2004 Cal.App.LEXIS 2195]. The Fourth District Court of Appeal held that an engineer who designed a retaining wall, under contract with a subcontractor, did not owe a duty towards, and thus was not liable to, the owners of the property when the design proved to be inadequate, causing the wall to fail with resulting damage to the property.

Orders made after facts known to judge, which establish disqualification, are void. A judge discovered after denying a motion for summary adjudication that he was disqualified because of prior contacts with an ADR provider. The newly assigned judge refused to vacate the order. Held: reversed. *California Code of Civil Procedure* § 170.3 (b)(4) provides that where grounds for disqualification are first learned or arise after a judge makes a ruling, the ruling shall not be set aside, absent good cause. But here, the judge knew the facts before ruling on the motion, his failure to disqualify himself was inadvertent; therefore, *Civ. Proc.* § 170.3 (b)(4) did not apply. (*Hartford Casualty Insurance Co. v. Superior Court* (Cal. App. Second Dist., Div. 5; December 22, 2004) (Case No. B176439) [2004 DJDAR 15199, 2004 Cal.App. LEXIS 2215].

When you file an interpleader you must deposit the disputed funds with the court or lose your claim to attorney fees. A bank filed an interpleader against two competing claimants to a $90,000 account, but, failed to deposit the funds with the court. In accordance with the interpleader statute (*Code Civ. Proc.* § 386 *et seq.*), the trial court granted the bank's motion for a discharge of its liability and awarded the bank $43,000 in attorney fees and costs. The Court of Appeal reversed the award of costs and fees, holding the bank was not entitled to fees and costs because of its failure to deposit the disputed funds with the court. *Wells Fargo Bank, N.A. v. Zinnel* (Cal. App. Third Dist.; December 28, 2004) (Case No. C044681) [2004 DJDAR 15307, 2004 Cal.App. LEXIS 2229].